YAW FUN FUN v. KETUA POLIS DAERAH GOMBAK, SELANGOR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[CIVIL APPEAL NO: WA-11BNCVC-13-03-2017]
18 NOVEMBER 2020

CIVIL PROCEDURE: *Pleadings – Issues not pleaded – Whether negligence must be pleaded with particularity – Breach of duty of care – Whether allowed to pursue on ground that duty of care breached despite issue not pleaded – Whether issues not pleaded ought not be allowed to be raised*

TORT: *Damages – Breach of statutory duty – Negligence – Whether allegations of duty of care specifically pleaded – Whether action premised on breach of common law duty of care – Whether breach of statutory duty pleaded – Failure to plead allegations of negligence with particularity – Whether issues not pleaded ought not be allowed to be raised*

This was an appeal by the appellant against the first ('D1'), second ('D2'), third ('D5') and fourth ('D6') respondents who were the first, second, fifth and sixth defendants, respectively, at the Magistrate's Court. The fourth defendant in the Magistrate's Court ('D4') was the registered owner of a car that bore the same chassis and engine numbers as car WMN 3818, which was reported as missing by one Yau Kok Keong. The plaintiff, who was in the business of buying and selling used cars, bought the vehicle from D4 through the third defendant ('D3') and sold it to one Adnan at the price of RM85,600. Adnan obtained hire-purchase financing from Public Bank Bhd. Before effecting the transfer of ownership from D4 to Adnan, the plaintiff obtained the approval and the '*Sijil Pemeriksaan Tukar Milik*' from Puspakom Sdn Bhd ('Puspakom'). However, just two days after the transfer, the vehicle was detained by D1 for an investigation under s. 379A of the Penal Code for theft of a motor vehicle arising from the police report, in view of the fact that the vehicle bore the same chassis and engine numbers as car WMN 3818. The plaintiff thus claimed for negligence against the defendants and pleaded that, although D2 and D5, the investigation officer, had knowledge of the police report, they failed to take any action to blacklist car WMN 3818 and/or the vehicle. As a result of the detention and seizure of the vehicle by D1 and the negligence of D1, D2 and D5, the plaintiff claimed that he had suffered losses and expenses and additionally alleged that his good name among the public, car sellers and financial institutions was also tarnished. The plaintiff thus sought special damages in the total sum of RM85,600 and also claimed general, exemplary and aggravated damages. At the Magistrate's Court, the plaintiff obtained judgment-in-default against D3 and D4 whilst, his claim

against the other defendants were dismissed. Hence, this appeal by the plaintiff against the dismissal. The main issue that arose for consideration was whether the Magistrate had erred in law and fact in concluding that there was no negligence on the part of D1, D2, D5 and D6 despite finding that D5 was negligent in carrying out his duties.

Held (dismissing plaintiff's appeal):

(1) The plaintiff's claim was undoubtedly premised on the tort of negligence and as such, the burden of proof lies on the plaintiff to establish, on a balance of probabilities, the four essential elements of the tort of negligence: (i) the defendants owed the plaintiff a duty of care; (ii) the defendants had breached that duty; (iii) the alleged breach had caused the damage *ie*, that there was a causal connection between the alleged cause and the effect; and (iv) the particular kind of damage/losses to the plaintiff was not so unforeseeable as to be too remote. Nowhere was the duty of care, allegedly owed by the defendants to the plaintiff, pleaded. Furthermore, the issues to be tried encompassed issues as to whether D1, D2 and D5 were negligent, and D6 vicariously liable, for the acts or omissions of D1, D2 and D5. (paras 33, 35 & 36)

(2) The plaintiff's cause of action was premised on a breach of the common law duty of care as opposed to a breach of a statutory duty since no statute was expressly pleaded in the statement of claim. However, in view of the issue pertaining to D5, the Magistrate framed the main issue in her grounds of judgment in terms of whether the defendants had breached their statutory duties. The Magistrate's analysis did not differentiate between whether the evidence was in the context of proving the elements of the plaintiff's claim based on the common law tort of negligence or a breach of statutory duty. In the main, the discussion was skewed towards the latter. The basic question as to whether the plaintiff's cause of action was based on the common law tort of negligence and/or a breach of statutory duty was not specifically addressed. It was thus not open to the plaintiff to bring, as a ground of appeal, the issue as to whether the defendants, particularly D5, had breached any statutory duty or that there was statutory negligence when the same was not pleaded by the plaintiff. (paras 40-43)

(3) A party is bound by its pleadings and the allegations of negligence must be pleaded with particularity. The plaintiff could not be allowed to pursue matters or issues that he had pleaded in his pleadings and not ventilated at the trial. The question which the plaintiff invited this court to probe was whether, even if the cause of action was not pleaded with the required particularity, D1 and D5 nevertheless owed a duty of care to the plaintiff and that there was a breach of such duty. The answer to this query must be in the negative. (paras 50 & 54)

(4) The requirement to blacklist car WMN 3818 was merely a SOP and not an obligation under any written law, in particular the Police Act 1967. The plaintiff did not adduce any evidence at the trial to establish a distinctive relationship between him and D1 and D5 or any additional characteristic which exposed the plaintiff to a particular risk of damage in consequence of the failure by D5 to blacklist car WMN 3818 which was different in its incidence from the general risk of damage from such similar omissions occasioned to other members of the public. In other words, the proximity of relationship between the plaintiff and D1 and D5 was not proven, on a balance of probabilities, at the trial. (paras 53 & 61)

(5) An action in negligence and for damages is not an appropriate vehicle for investigating the efficiency of the Polis Diraja Malaysia and the Road Transport Department. There are internal procedures/inquiries in place for investigations against incompetent police personnel whose acts or omissions are not wilful in nature such as the omission to blacklist car WMN 3818. The plaintiff's recourse was against D3 and D4 for which judgment in default had been entered. Hence, the Magistrate's conclusion that there was no negligence on the part of D1, D2, D5 and D6 was not plainly wrong. (paras 62 & 63)

Case(s) referred to:

Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal [2014] 9 CLJ 15 CA ***(refd)***

Dorset Yacht Co Ltd v. Home Office [1970] AC 1004 ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Hill v. Chief Constable of West Yorkshire [1989] 1 AC 53 ***(refd)***

Hu Sepang v. Inspector Keong On Eng & Ors [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC ***(dist)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

IOI Corporation Bhd v. Gemencheh Granite Sdn Bhd [2015] 10 CLJ 332 HC ***(refd)***

Ketua Pengarah Jabatan Kerja Raya v. Strongkota Development Sdn Bhd & Another Appeal [2016] 3 CLJ 741 CA ***(refd)***

Ketua Polis Negeri Sembilan & Anor v. Manoharan Dorasamy [2004] 1 CLJ 101 FC ***(refd)***

Lee Chee Keong v. Fadason Holdings Sdn Bhd & Other Appeals [2017] 7 CLJ 295 CA ***(refd)***

Low Tin Yong v. Low Yong Thuan [2016] 5 CLJ 217 CA ***(refd)***

Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA ***(refd)***

Merita Merchant Bank Singapore Ltd v. Dewan Bahasa Dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***

Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***

A *Pendaftar Dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd [2000] 2 CLJ 573 CA* ***(dist)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2007] 5 CLJ 489 CA ***(refd)***

B **Legislation referred to:**
Evidence Act 1950, s. 114(g)
Penal Code, s. 379A
Police Act 1967, ss. 3(3), 13, 20, Second Schedule
Road Transport Act 1987, ss. 8, 10, 12
Rules of Court 2012, O. 18 r. 19(1)(a)

C *For the appellant - Lim Kien Huat & Tang Keen Cheong; M/s Lee & Lim*
For the respondents - Azza Azmi, Rebecca Helden Leong Poh Leng & Ahmad Faiz Razali; FCs

Reported by S Barathi

D **JUDGMENT**

Aliza Sulaiman J:

Introduction

[1] On 21 March 2019, this court heard the appellant's appeal against the
E entire decision of the learned Magistrate which was pronounced on 24 February 2017 in dismissing the appellant's claim for negligence against the respondents with costs of RM3,000. The appellant's notice of appeal was dated and filed on 3 March 2017.

[2] Subsequent to the filing of further submissions by the appellant's
F counsel and federal counsel ("FC"), the decision of the court was pronounced on 19 April 2019 whereby the appellant's appeal was dismissed with costs of RM6,000 to be paid by the appellant to the respondents, subject to allocatur.

[3] The appellant then filed a notice of motion at the Court of Appeal on
G 9 May 2019 seeking leave to appeal against the decision of this court. On 25 June 2020, the Court of Appeal allowed the appellant's leave application and the notice of appeal was duly filed on 26 June 2020.

[4] In these grounds of judgment, the parties shall be referred to as they
H were in the court below, namely the appellant as "the plaintiff" and the first, second, third and fourth respondents as the "first defendant" ("D1"), "second defendant" ("D2"), "fifth defendant" ("D5") and "sixth defendant" ("D6"), respectively.

Background Facts

I **[5]** The plaintiff is the sole proprietor of Perniagaan Smart Power Land which is in the business of buying and selling used cars.

[6] D1, D2 and D6 need no introduction except to state that the plaintiff alleged that D6 is vicariously liable for all the actions of D1, D2 and D5.

[7] At the material time, D5 was the investigating officer ("IO") assigned to investigate the police report lodged by Yau Kok Keong on 3 February 2007 that his car, model Toyota Wish UA-ZNE10(A) with registration number WMN 3818, chassis number ZNE10-0095771 and engine number 1ZZ1597592 ("Car WMN 3818"), was missing ("police report").

[8] The fourth defendant ("D4") was the registered owner of a car, model Toyota Wish with registration number WSP 6383 ("said vehicle"), that bears the same chassis and engine numbers as Car WMN 3818.

[9] In July 2010, the plaintiff bought the said vehicle from D4 through the third defendant ("D3") at a price of RM79,000. According to para. 8 of the amended statement of claim ("SoC") dated 28 November 2013, the plaintiff then spent RM5,360 to repair and refurbish ("membaikpulih") the said vehicle before selling the same to one Adnan bin Ali ("Adnan") in August 2010 at the price of RM85,600. Adnan obtained hire-purchase financing from Public Bank Bhd.

[10] Before effecting the transfer of ownership from D4 to Adnan, the plaintiff had brought the said vehicle to Puspakom Sdn Bhd ("Puspakom") for an inspection. Puspakom had given their approval and the "Sijil Pemeriksaan Tukar Milik" was duly issued.

[11] Subsequently, the plaintiff handed all the necessary forms to D2 for purposes of transferring and registering Adnan's name as the owner of the said vehicle. This was successfully done on 17 August 2010 by "CTZALIHA" an employee and/or servant of D2 ("said transfer").

[12] However, just two days after the said transfer, the said vehicle was detained by D1 for investigation under s. 379A of the Penal Code (Act 574) for theft of a motor vehicle arising from the police report in view of the fact that the said vehicle bears the same chassis and engine numbers as Car WMN 3818.

[13] In para. 13.4 of the SoC, the plaintiff pleaded that, although D2 and D5 had knowledge of the police report, they failed to take any action to blacklist Car WMN 3818 and/or the said vehicle. As a result of the detention and seizure of the said vehicle by D1 and the negligence of D1, D2 and D5, the plaintiff claimed that he had suffered losses and expenses. The plaintiff additionally alleged that his good name among the public, car sellers and financial institutions was also tarnished.

[14] D3 and D4 are said to have made representations to the plaintiff that D3 was the owner of the said vehicle and due to D1's detention of the said vehicle, D3 and D4 did not have any right to sell the same to the plaintiff.

[15] The plaintiff had to return the payment made by Adnan and Public Bank Bhd for the purchase of the said vehicle.

[16] The particulars of special damages claimed by the plaintiff is set out in sub-paras. 19(a) to (j) of the SoC in the total sum of RM85,600. Apart from the said amount, the plaintiff also claimed general damages, exemplary and aggravated damages and interest thereon as well as costs.

[17] The plaintiff obtained judgment-in-default against D3 and D4 on 13 December 2016. Being dissatisfied with the decision of the learned Magistrate in dismissing his claim against the other defendants, the plaintiff appealed to this court.

[18] From the record of appeal ("RoA"), it appears that the plaintiff had previously appealed to the Court of Appeal against the decision of the High Court on 10 November 2017 in allowing the defendants' preliminary objections and dismissing the plaintiff's appeal without hearing the merits of the appeal. On 22 March 2018, the Court of Appeal granted leave to the plaintiff to appeal and the hearing of the appeal was fixed on 24 January 2019. However, on the date of the hearing, the parties agreed not to proceed with the preliminary objections and hence, the Court of Appeal ordered that the plaintiff's appeal is allowed and the case be remitted back to this court for the appeal to be heard on merits.

Proceedings At The Magistrate's Court

[19] The plaintiff gave evidence at the trial ("PW1") together with Mr Kwok Thong Chiow, the Manager of Perniagaan Smart Power Land ("PW2") whilst seven witnesses testified for D1, D2, D5 and D6.

[20] D5 did not take the witness stand. Instead the IO who took over investigations into the police report, ASP Lee Kui Lin ("DW1") was called to give evidence alongside three counter staffs from the Road Transport Department, Wilayah Persekutuan Kuala Lumpur ("RTD") namely Zarina binti Mat Saud (DW2), Mohd Akib bin Abu Bakar (DW3) and Siti Zaliha binti Dolah (DW4); Siti Suhana binti Awang (DW5), the Head of Unit Rekod, Bahagian Perlesenan dan Pendaftaran Kenderaan, RTD; Mohd Hisyam bin Ibrahim (DW6), the Assistant Enforcement Officer at RTD who was appointed as IO to investigate the case involving Car WMN 3818 and the said vehicle; and DSP Ng Siew Hiang (DW7) who was responsible for the seizure of Car WMN 3818/the said vehicle from Adnan.

The Memorandum Of Appeal

[21] The plaintiff listed 19 grounds of appeal in the Memorandum of Appeal ("MoA"). Having had the benefit of the parties' written submissions, for present purposes, I would adopt the clustering of the grounds of appeal

as set out in the FC's written submissions dated 21 February 2019 with some slight modification, which in my view, best reflects the core reasons for the plaintiff's appeal.

[22] Basically, the plaintiff contends that the learned Magistrate had erred in law and fact:

(i) when she found, in relation to grounds 1, 2, 3 and 7 of the MoA, that:

(a) there was no negligence on the part of D1, D2, D5 and D6 despite finding that D5 was negligent in carrying out his duties;

(b) D5's negligence in failing to blacklist the said vehicle is a mere breach of the standard operating procedure ("SOP") of the Royal Malaysia Police ('PDRM');

(c) the failure by D1 and D5 to blacklist the said vehicle in the Sistem Rekod Kenderaan Yang Dikehendaki ("KOMPOL") is a mere breach of the SOP; and

(d) D1 and D5 were not in breach of any statutory duty despite the conclusion that D5 was negligent in having failed to blacklist the said vehicle;

(ii) when she held, in respect of grounds 4 and 5 of the MoA, that there is no provision under any written law, specifically the Police Act 1967 (Act 344) ("PA 1967"), and no general law which provides for the duty on D1 and D5 to prevent crimes;

(iii) when, as to grounds 6, 8 and 9, she failed to take into consideration that:

(a) blacklisting the said vehicle is a duty and responsibility to prevent crimes;

(b) the failure by D1 and D5 to blacklist the said vehicle has resulted in a criminal act namely, the sale of the said vehicle by D4 to the plaintiff; and

(c) D1 and D5 owe a duty and/or responsibility to look after, prevent and/or avoid the commission of any criminal activities;

(iv) when, in respect of grounds 10 to 14, she failed to take into consideration that:

(a) the plaintiff had wholly relied on the duty and responsibility of D1, D2, D5 and D6 to take care of the information provided by them before buying the said vehicle from D4 and subsequently selling the same to Adnan;

(b) despite the above said reliance by the plaintiff, the said vehicle was still detained by D1 on the ground that it is a stolen vehicle;

(c) the said vehicle was detained on 19 August 2010 after it was bought by the plaintiff in July 2010 and reported stolen more than three years earlier on 3 February 2007; and

(d) the information provided by the defendants is referred to and relied upon by the Malaysian community before ownership of a vehicle is transferred;

(v) when she failed to consider that D5 did not attend the trial; and

(vi) by failing to take into consideration the fact that the plaintiff's claim is for damages and not for the said vehicle; and that the car was detained a mere two days after the transfer of ownership was done on 17 August 2010 and as a result, the plaintiff's reputation among the financial institutions was affected, in determining the claim for aggravated damages.

The Legal Principles

[23] Mary Lim JCA (now FCJ) in *Lee Chee Keong v. Fadason Holdings Sdn Bhd & Other Appeals* [2017] 7 CLJ 295 had, at pp. 308 to 313, enlightened on the test of intervention by an appellate court which is firmly established by the apex court and the Court of Appeal in a host of cases (see *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa Dan Pustaka* [2014] 9 CLJ 1064; *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665; and *Low Tin Yong v. Low Yong Thuan* [2016] 5 CLJ 217), and the justification for such a "limited, rare and restrained exercise of intervention" by the appellate court as to the decision arrived at by a trial court.

[24] In *MMC Oil & Gas Engineering* (*supra*), Nallini Pathmanathan JCA (now FCJ) at pp. 674 to 675 elucidated that the correct standard to be applied in determining whether the findings of the trial court is "plainly wrong" is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. An appellate court is not at liberty to reverse or interfere in the decision of the trial judge even if the appellate court is of the view that it would not have reached the conclusion that the trial judge did based on the evidence that was placed before the trial judge. Her Ladyship provided some examples as to when a first instance judgment is susceptible to challenge ie, failure to address or wholly ignores material evidence on issues placed before it; arriving at bald findings of fact with no reasoning or evidence to substantiate such findings; errors of law; and clear misunderstanding of relevant evidence.

[25] Applying the trite legal principles to the instant appeal, this court ought not readily interfere with the findings of fact of the learned Magistrate upon whom the law entrusts the primary duty to evaluate the evidence adduced at the trial and who had the audio-visual benefit of the witnesses. However, if the plaintiff is able to convince this court that the court below was plainly wrong in arriving at its conclusion in the sense that it has so fundamentally misdirected itself; there being no or insufficient judicial appreciation of the pleadings and evidence, or where the acceptance or rejection of the evidence is not founded on good reasons, and no reasonable judge could have reached that conclusion then this court must intervene so as to prevent a miscarriage of justice.

[26] With the aforementioned legal principles in mind, I now turn to the main issue that arose for consideration at the hearing of this appeal, and which, in my view, is sufficient to dispose of the appeal.

Whether The Learned Magistrate Had Erred In Law And Fact When She Concluded That There Was No Negligence On The Part Of D1, D2, D5 And D6 Despite Finding That D5 Was Negligent In Carrying Out His Duties

The Plaintiff's Submissions

[27] Mr KH Lim submitted that the learned Magistrate erred in law and in fact when she made contradictory findings by concluding that there was no negligence by D1, D2, D5 and D6 in failing to blacklist Car WMN 3818 despite finding that D5 was negligent in carrying out his duty. The reasoning given by the learned Magistrate that D5's failure to blacklist Car WMN 3818 and/or any car which has chassis number ZNE10-0095771 and engine number 1ZZ1597592 following the police report was merely a breach of SOP and does not amount to negligence is alleged to be erroneous.

[28] It was additionally argued that the trial court fell into error by deciding beyond the pleadings when it held that the Police Act 1967 ("PA 1967") did not expressly stipulate that D1 and D5 have to blacklist any vehicle reported as missing and as such, D1 and D5 did not breach any statutory duty, whereas the plaintiff's pleaded case was based on common law tort of negligence and not on any breach of statutory duty and/or statutory negligence.

[29] Oddly enough, learned counsel for the plaintiff concurrently submitted that the learned Magistrate failed to appreciate that D1 and D5 have breached their statutory duty and/or the Constitution of PDRM, in particular sub-s. 3(3) of the PA 1967, to maintain law and order and prevent and detect crime when they failed to blacklist Car WMN 3818 in the KOMPOL system following the police report. If Car WMN 3818 had been

blacklisted in the KOMPOL system, such information would be linked to D2's Sistem Informasi Kenderaan dan Pemandu (SIKAP) for the processing of transaction and D2 would have known that the said vehicle, which has the same chassis and engine number as Car WMN 3818, was under investigation for theft. The sale of the said vehicle by D4 to the plaintiff and the subsequent transfer and registration of ownership from D4 to Adnan which resulted in pecuniary loss to the plaintiff could have thus been prevented.

[30] According to the plaintiff, the evidence by witnesses who testified for D1 and D5 supports a finding that D1 and D5 have not only failed to prevent and detect crime, but they have actually allowed the commission of a crime by failing to blacklist Car WMN 3818.

Submissions By D1, D2, D5 And D6

[31] The learned FC, in submitting for these defendants, contended that grounds 1, 2, 3 and 7 in the MoA are unsubstantiated for the following reasons:

(i) DW1 had testified that there is no provision in the PA 1967 which states that it is the duty of the police to:

(a) blacklist a stolen vehicle; and

(b) inform the RTD on the status of a stolen vehicle;

(ii) the powers and duties of a police officer can only come within the ambits of the PA 1967 or the regulations made thereunder and so it is impossible to hold someone liable for not doing something that he was not legally obligated to do in the first place; and

(iii) there is no error in the findings by the learned Magistrate including the determination that investigations in relation to the disappearance of Car WMN 3818 had been completed and concluded when Car WMN 3818 was found and Yau Kok Keong received compensation in the sum of RM110,000 from his insurers on 29 May 2007.

Evaluation And Decision Of The Court

[32] In her analysis of the case, the learned Magistrate begins with a statement on the gist of the plaintiff's claim "… bahawa defendan-defendan telah cuai dalam menjalankan tugas masing-masing sehingga mengakibatkan plaintif mengalami kerugian akibat kegagalan menjual kereta tersebut. Plaintif mengatakan bahawa defendan-defendan berhutang satu tugas berhati-hati kerana plaintif telah bergantung kepada maklumat, pemeriksaan dan kelulusan yang diberikan bagi pendaftaran kereta tersebut. D6 juga adalah dipertanggungjawabkan secara vicarious di atas kecuaian yang telah dilakukan oleh pegawai awamnya".

[33] The plaintiff's claim is undoubtedly premised on the tort of negligence and as such, the burden of proof lies on the plaintiff to establish, on a balance of probabilities, the four essential elements of the tort of negligence, namely that:

(i) the defendants owes the plaintiff a duty of care;

(ii) the defendants have breached that duty;

(iii) the alleged breach had caused the damage ie, that there is a causal connection between the alleged cause and the effect; and

(iv) the particular kind of damage/losses to the plaintiff is not so unforeseeable as to be too remote: see *Clerk & Lindsell on Torts*, 20th edn, 2010 at para. 8-04, p. 415.

For current purposes, the focus of discussion is on element (i) above *viz.* the duty of care that is allegedly owed by D1, D2 and D5 to the plaintiff in this case.

[34] Apart from the words "… Plaintif mengatakan bahawa defendan-defendan berhutang satu tugas berhati-hati …" in the above-quoted part of the judgment, the learned Magistrate goes on to say that "Isu utama yang perlu diputuskan oleh mahkamah adalah sama ada defendan-defendan telah cuai dalam menjalankan tugas masing-masing dan sama ada defendan-defendan telah melanggar kewajipan statutory mereka …".

[35] I have scrutinised the pleadings in their entirety at pp. 3 to 22 in the RoA (encl. 3) and I find that nowhere is the duty of care that is allegedly owed by the defendants to the plaintiff pleaded. Instead, para. 15 of the SoC sets out the particulars of negligence which is re-produced in full below:

Butir-Butir Kecuaian Defendan Pertama dan Defendan Kelima

a) gagal menyenarai hitamkan Kereta tersebut;

b) gagal memberitahu Defendan Kedua bahawa Kereta tersebut adalah sebuah kereta curi;

c) gagal mengambil langkah-langkah yang sewajarnya untuk memastikan bahawa Kereta tersebut tidak ditukarmilik kepada pihak lain, khususnya Adnan;

d) gagal melakukan siasatan sepenuhnya ke atas laporan kecurian Kereta WMN3818 dengan sempurna.

Butir-Butir Kecuaian Defendan Kedua

a) gagal mengesahkan bahawa Kereta tersebut adalah sebuah Kereta curi;

A b) membenarkan pendaftaran tukar milik Kereta tersebut kepada Adnan walaupun butir-butir nombor enjin dan nombor casis Kereta tersebut dan Kereta WMN3818 adalah sama;

c) gagal memberhentikan pendaftaran Kereta tersebut walaupun mempunyai pengetahuan bahawa nombor casis dan injin Kereta B tersebut adalah milik kenderaan dengan nombor pendaftaran No. WMN3818;

d) gagal memastikan semua butir-butir bagi Kereta tersebut adalah betul dan tidak diusik;

e) gagal mengambil langkah-langkah yang sewajarnya bagi memastikan C bahawa semua butir-butir bagi Kereta tersebut adalah betul sebelum melakukan pendaftaran tukar milik Kereta tersebut daripada Defendan Keempat kepada Adnan.

[36] Furthermore, the issues to be tried ("ITBT") dated 18 May 2016 and signed only by the plaintiff's solicitors (at pp. 112 to 114 of the RoA) D encompassed issues as to whether D1, D2 and D5 are negligent, and D6 vicariously liable, for the acts or omissions of D1, D2 and D5 as follows:

1. Samada Defendan Kelima sebagai pegawai penyiasat Defendan Pertama bagi laporan polis oleh Yau Kok Keong bertarikh 3-2-2007 tentang kehilangan kereta Toyota Wish yang bernombor E pendaftaran WMN 3818 dengan mempunyai nombor enjin 1ZZ1597592 dan nombor casis ZNE10-0095771 ("Kereta WMN 3818") telah cuai dengan gagal untuk:

   a) menyenarai hitamkan Kereta WMN 3818;

   b) memberitahu Defendan Kedua bahawa Kereta tersebut adalah F sebuah kereta curi;

   c) mengambil langkah-langkah yang sewajarnya untuk memastikan bahawa Kereta tersebut tidak ditukarmilik kepada pihak lain, khususnya Adnan;

   d) melakukan siasatan sepenuhnya ke atas laporan kecurian Kereta G WMN 3818 dengan sempurna;

2. Samada Defendan Pertama bagi laporan polis oleh Yau Kok Keong tentang kehilangan kereta Toyota Wish yang bernombor pendaftaran WMN 3818 dengan mempunyai nombor enjin 1ZZ1597592 dan nombor casis ZNE10-0095771 ("Kereta WMN H 3818") telah cuai dengan gagal untuk:

   a) menyenarai hitamkan Kereta WMN 3818;

   b) memberitahu Defendan Kedua bahawa Kereta tersebut adalah sebuah kereta curi;

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c) mengambil langkah-langkah yang sewajarnya untuk memastikan bahawa Kereta tersebut tidak ditukarmilik kepada pihak lain, khususnya Adnan;

d) melakukan siasatan sepenuhnya ke atas laporan kecurian Kereta WMN 3818 dengan sempurna;

3. Samada Defendan Kedua yang bertanggungjawab untuk mengurus buku daftar semua kenderaan telah cuai dengan gagal untuk:

a) mengesahkan bahawa Kereta tersebut adalah sebuah kereta curi;

b) menahan atau memberhentikan pendaftaran tukar milik Kereta tersebut dari Defendan Keempat kepada Adnan walaupun mempunyai pengetahuan bahawa nombor enjin dan casis Kereta tersebut adalah milik kenderaan Kereta WMN 3181;

c) memastikan semua butir-butir bagi Kereta tersebut adalah betul dan tidak diusik;

d) mengambil langkah-langkah yang sewajarnya bagi memastikan bahawa semua butir-butir bagi Kereta tersebut adalah betul sebelum melakukan pendaftaran tukar milik Kereta tersebut daripada Defendan Keempat kepada Adnan;

4. Samada Defendan Kedua yang bertanggungjawab untuk mengurus buku daftar semua kenderaan telah cuai dengan membenarkan pendaftaran tukar milik Kereta tersebut daripada Defendan Keempat kepada Adnan walaupun butir-butir nombor engin dan casis Kereta tersebut dan Kereta WMN 3818 adalah sama.

5. Samada Defendan Keenam bertanggungjawab secara vikarius terhadap kesemua tindakan dan atau peninggalan Defendan Pertama, Kedua dan Kelima.

… .

[37] Meanwhile D1, D2, D5 and D6 in their ITBT (at pp. 115 to 116 RoA) had framed the issues for the determination of the trial court in this manner:

(1) DEFENDAN PERTAMA

(i) Sama ada pihak Defendan Pertama telah melakukan siasatan yang lengkap dan menyeluruh ke atas kehilangan kenderaan no pendaftaran WMN 3818/WSP 6383.

(2) DEFENDAN KEDUA

(i) Sama ada Defendan Kedua melalui Petugas Kaunternya telah melakukan transaksi pada 8.5.2009 (transaksi pertukaran hakmilik kenderaan dilakukan di JPJ Wilayah Persekutuan daripada Yau Kok Keong kepada Ahmad Tarmizi bin Mohamad

A Nori), 12.5.2009 (transaksi pemindahan no pendaftaran (interchange) daripada WMN 3818 kepada WSP 6383) dan 17.8.2010 (transaksi pertukaran hakmilik kenderaan WSP 6383 daripada Ahmad Tarmizi bin Mohamad Nori kepada Adnan bin Ali) berdasarkan suratcara yang lengkap dan teratur.

B (3) DEFENDAN KELIMA

(i) Sama ada Defendan Kelima telah melanggar apa-apa kewajipan statutori di dalam tidak mendaftarkan kehilangan kenderaan no pendaftaran WSP 6383 ke dalam sistem senaraihitam PDRM.

[38] In para. 42 of the plaintiff's written submission at the lower court, it C was submitted that D1, D2 and D5 owe a duty of care to the plaintiff "… kerana plaintif telah membeli, menjual dan mendaftarkan hakmilik kereta tersebut dengan bergantung sepenuhnya kepada pemeriksaan, maklumat dan kelulusan defendan kedua". The plaintiff apparently prejudged the existence of a duty of care as the rest of the submissions were mainly to convince the D court that D1, D2 and D5 had breached their duty of care to the plaintiff.

[39] As for the FC's written submissions on behalf of D1, D2, D5 and D6, the issue in para. (3)(i) of their ITBT was naturally addressed. The FC emphasised that there is no provision in any written law, particularly the PA 1967, which imposes such a statutory duty on D5 and the cases of *Minister* E *Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641 and *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2007] 5 CLJ 489; [2007] 6 MLJ 530 were cited to support the FC's contentions. It is noteworthy that in respect of the issue relating to D2, ss. 8, 10 and 12 of the Road Transport Act 1987 (Act 333) and the Federal F Court decision in *Ketua Polis Negeri Sembilan & Anor v. Manoharan Dorasamy* [2004] 1 CLJ 101; [2004] 3 MLJ 565 were referred to in the written submissions.

[40] It is apparent from the pleadings and ITBT that the plaintiff's cause of action is as what his counsel has submitted, namely that it is premised on a G breach of the common law duty of care as opposed to a breach of a statutory duty since no statute was expressly pleaded in the SoC.

[41] However, in view of the issue pertaining to D5 as shown in the above excerpt from the ITBT of D1, D2, D5 and D6, the learned Magistrate framed the main issue in her grounds of judgment in terms of whether the H defendants had breached their statutory duties. In her analysis of this issue, the learned Magistrate said (with my added emphasis):

… Setelah mendengar keterangan-keterangan yang telah dikemukakan dan juga setelah mahkamah meneliti dokumen-dokumen yang telah difailkan, mahkamah mendapati bahawa defendan-defendan kecuali D5 I telah melaksanakan tugas masing-masing berdasarkan skop kerja masing-masing. Siasatan yang dijalankan oleh SD1 telah lengkap dan selesai

kerana kereta tersebut telahpun dijumpai dan Yau Kok Keong telah mendapat pampasan daripada pihak insuran pada 29.5.2007 sebanyak RM110,000.00. Rampasan yang dilakukan oleh pihak D1 pada 19.8.2010 adalah dibuat berdasarkan maklumat yang kereta tersebut telah melalui proses interchange kepada nombor pendaftaran baru iaitu WSP 6383.

Pegawai-pegawai bagi D2 juga didapati telah melakukan transaksi pada 8.5.2009, 12.5.2009 dan 17.8.2010 berdasarkan suratcara yang teratur dan lengkap. Seperti yang telah diterangkan oleh SD2, SD3 dan SD4 semasa memberi keterangan, mereka telah mengesahkan bahawa tiada sebarang sekatan atau halangan oleh system SIKAP JPJ semasa mereka memproses transaksi pada tarikh-tarikh berkenaan. Oleh yang demikian, mahkamah memutuskan bahawa tiada kecuaian yang dilakukan oleh pihak defendan-defendan.

Mengenai D5, mahkamah bersetuju bahawa D5 telah cuai dalam menjalankan tugas beliau. Walau bagaimanapun, kecuaian yang dilakukan adalah kecuaian melanggar 'Standard Operating Procedure' pihak PDRM kerana keperluan untuk menyenarai hitam kereta tersebut adalah satu SOP sahaja. *Tiada apa-apa peruntukan dalam mana- mana undang-undang bertulis khususnya Akta Polis berkenaan dengan perkara tersebut.* Dalam perihal ini, mahkamah merujuk kepada prinsip yang berkaitan dalam kes *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd* [2007] 6 MLJ 530 di mana Mahkamah Rayuan menyatakan seperti berikut:

> where a statute confers powers coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie.

Menggunapakai prinsip di atas, *memandangkan tiada peruntukan undang-undang mengenai keperluan untuk menyenaraihitamkan kereta tersebut, mahkamah memutuskan bahawa tiada sebarang kewajipan statutory yang telah dilanggar oleh pihak D1 dan D5 dalam kes ini.*

…

Melalui keterangan SD6 iaitu DSP Ng Siew Hiang, selepas rampasan dibuat, satu tindakan tatatertib telah dilakukan terhadap D5 selaku AIO dalam kes tersebut. Kesimpulan siasatan adalah terdapat salah laku dari segi siasatan yang dikendalikan oleh D5 berhubung dengan kes kehilangan kereta. Menggunapakai prinsip yang dinyatakan di atas tersebut, mahkamah berpendapat bahawa *kegagalan D5 untuk menyenaraihitam kereta tersebut ke dalam system KOMPOL* (satu system yang bertujuan untuk menyimpan rekod 'wanted' serta kenderaan yang dilaporkan hilang) *adalah satu perlanggaran SOP PDRM sahaja, bukannya perlanggaran tugas statutory yang diperuntukkan dalam undang-undang. Lantaran itu, mahkamah memutuskan Defendan-defendan khususnya D5 tidak melanggar apa-apa kewajipannya mahupun kewajipan statutory dalam melaksanakan tugas dan siasatannya.* Di samping itu, tiada sebarang bukti yang dikemukakan di mahkamah yang menunjukkan bahawa kegagalan menyenaraihitam kereta tersebut adalah disengajakan.

… (emphasis added)

[42] Having read the reasoning by the trial court, the learned Magistrate's articulation of her views is, with respect, not without difficulty because her analysis did not differentiate between whether the evidence was in the context of proving the elements of the plaintiff's claim based on the common law tort of negligence or a breach of statutory duty. In the main, the discussion is skewed towards the latter, although in the second last paragraph of her judgment, she held that "… Lantaran itu, mahkamah memutuskan defendan-defendan khususnya D5 tidak melanggar apa-apa kewajipannya mahupun kewajipan statutory dalam melaksanakan tugas dan siasatannya. …" which seems to denote some other duties than those provided under statute. In any event, it is evident that the basic question as to whether the plaintiff's cause of action is based on the common law tort of negligence and/or a breach of statutory duty was not specifically addressed.

[43] Returning to the plaintiff's ground of appeal that the learned Magistrate had erred in law and fact when she considered the issue as to whether the defendants, particularly D5, had breached any statutory duty or that there was statutory negligence when the same was not pleaded by the plaintiff, it is my considered view that the plaintiff could, and should, have raised the matter about the correctness of including the issue in para. (3)(i) of the ITBT by D1, D2, D5 and D6 before the ITBT was finalised at the court below. By failing to do so at the appropriate time, and the trial having proceeded on the basis of the ITBT as filed, it is now not open to the plaintiff to bring this matter as a ground of appeal.

[44] In any event, the plaintiff himself is not entirely consistent on his stand. The following passages from the written submission in this appeal bear testimony to this fact:

> 25. At all material time, the Appellant's case was based on common tort of negligence and not any breach of statutory duty and/or statutory negligence. Therefore, the learned Magistrate has erred in law and facts when she decided out from the pleadings.
>
> …
>
> 26. Be that as it may, it is the Appellant's humble submission that the 1st and 3rd Respondents are negligent in failing to blacklist Car WMN 3818 following the Missing Report and such failure is not merely a breach of SOP but a breach of the Constitution of the Royal Malaysia Police Force in particular the duty of maintenance of law and order and the prevention and detection of crime.

[45] Section 3 in the PA 1967 provides for the Constitution of the Police Force in these terms:

3(1) All persons who are immediately before the commencement of this Act members of the Royal Malaysia Police established under the Royal Malaysia Police Act 1963 [30 of 1963], shall upon the commencement of this Act become members of the Royal Malaysia Police under this Act (hereinafter referred to as "the Force") with corresponding ranks and in corresponding capacities.

(2) Every person aforesaid shall be employed on the same terms and conditions as were applicable to them immediately before the commencement of this Act.

(3) The Force shall subject to this Act be employed in and throughout Malaysia (including the territorial waters thereof) for the maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.

[46] Apart from sub-s. 3(3) in the PA 1967, the plaintiff further relied on ss. 13, 20 and the Second Schedule in the same Act in submitting that as members of PDRM, D1 and D5 owe a duty of care to the plaintiff to:

(i) prevent the crime of trading Car WMN 3818, which is a stolen car, in the market;

(ii) assist the plaintiff in protecting the property related to his business by blacklisting all stolen and wanted vehicles including Car WMN 3818; and

(iii) protect the plaintiff's property from loss in dealing and/or trading a stolen vehicle ie, Car WMN 3818.

[47] The additional statutory provisions cited by the plaintiff (with his added emphasis) are re-produced below for ease of reference (the Second Schedule in the PA 1967 provides for the Declaration of Office):

Declaration by police officer on appointment

13. Every police officer and extra police officer shall, on first joining the Force or before entering on the duties of his office, make before a senior police officer of or above the rank of Superintendent the declaration set out in the Second Schedule in such manner as he may declare to be most binding on his conscience.

…

General duties of police officers

20. …

(3) Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in section 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including:

A (a) apprehending all persons whom he is by law authorized to apprehend;

(b) processing security intelligence;

(c) conducting prosecutions;

B (d) giving assistance in the carrying out of any law relating to revenue, excise, sanitation, quarantine, immigration and registration;

(e) giving assistance in the preservation of order in the ports, harbours and airports of Malaysia, and in enforcing maritime and port regulations;

C (f) executing summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority;

(g) exhibiting information;

(h) protecting unclaimed and lost property and finding the owners thereof;

D (i) seizing stray animals and placing them in a public pound;

(j) **giving assistance in the protection of life and property;**

(k) **protecting public property from loss or injury;**

E (l) attending the criminal courts and, if specially ordered, the civil courts, and keeping order therein; and

(m) escorting and guarding prisoners and other persons in the custody of the police.

(emphasis added)

F **[48]** In addition, the plaintiff cited the case authorities of *Hu Sepang v. Inspector Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739; [1990] 3 MLRH 403; *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15; [2014] 6 MLRA 489; and *Pendaftar Dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd* [2000] 2 CLJ 573; [2000] 1 MLRA 140 to strengthen his argument G that there exist duties of care in the discharge of powers exercised by D1, D2 and D5.

[49] In response, the learned FC stressed that at the end of the trial, the plaintiff did not refer to any authority, whether in the form of statute or case H law, to support the proposition that D1 and D5 owe a duty of care to the plaintiff to blacklist Car WMN 3818. All these arguments were raised for the first time in the hearing of this appeal.

[50] In this regard, the court has no hesitation in agreeing with the learned FC's submission that it is trite law that a party is bound by its pleadings and I that the allegations of negligence must be pleaded with particularity. The

plaintiff cannot be allowed to pursue matters or issues that he has not pleaded in his pleadings and not ventilated at the trial (see, *inter alia*, *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; *Ketua Pengarah Jabatan Kerja Raya v. Strongkota Development Sdn Bhd & Another Appeal* [2016] 3 CLJ 741; and *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415). It is irrefutable that for his submissions at the Magistrate's Court, the only case authorities cited by the plaintiff were *Chan Yoke Lain* (*supra*); *Cheng Hang Guan* (*supra*); and *IOI Corporation Bhd v. Gemencheh Granite Sdn Bhd* [2015] 10 CLJ 332; [2015] MLRHU 311 to support the arguments on the applicability of the presumption of adverse inference under s. 114(g) of the Evidence Act 1950 and the claim for exemplary damages.

[51] As for two of the cases cited by the plaintiff before this court, these are easily distinguishable for the following reasons:

(i) In *Hu Sepang* (*supra*), it was plain from the plaintiff's pleadings that he had pegged his cause of action against Inspector Keong On Eng and the Chief Police Officer, Melaka as the first and second defendants, respectively, for breach of statutory duty as provided under the PA 1967 for failing or refusing to render assistance to the plaintiff who was physically assaulted by persons unknown to the plaintiff at the Melaka State Assembly in the presence of the first defendant. Moreover, the reported judgment of the High Court is as regards the appeal against the decision of the Senior Assistant Registrar in dismissing the defendants' application to strike out the writ action pursuant to O. 18 r. 19(1)(a) of the Rules of Court 2012 as opposed to a decision arrived at after a full trial.

(ii) In *Pendaftar Dan Pemeriksa Kereta-Kereta Motor, Melaka* (*supra*), the Court of Appeal affirmed the findings of the Sessions Court that the incidence of negligence or negligent statement and misrepresentation as particularised in the amended SoC have been proven. The evidence showed that the clerk employed by the respondent, a car trader just like the plaintiff in the instant appeal, had gone to the registry of the second appellant to finalise the sale of the car in question by having it transferred into the respondent's name as the new owner. However, the contents of the file that was compared for verification was not the original file of the car and was instead a substituted and fabricated file. The registries of the first and second appellants in that case had clearly been penetrated by person or persons unknown and the court held that the unauthorised intrusion can only happen with the assistance of officers in the employment of those appellants. Furthermore, this incident was not an isolated case and there had been wide transgressions. In these circumstances, the trial court had correctly held the first and

second appellants accountable for their dereliction of duty to take care that all information coming from them are accurate. In contrast, the learned Magistrate in the present case made a finding of fact, and rightfully so, that there was no dereliction of duty on the part of the RTD officers.

[52] The plaintiff additionally relied on the case of *Datuk Seri Khalid Abu Bakar* (*supra*), particularly paras. 47 to 49 of the judgment at pp. 41 to 42 (CLJ); pp. 508 to 509 (MLRA) of the report, to plead to this court that common sense dictates that a reported missing vehicle must be blacklisted by PDRM to prevent any further criminal activity and a duty of care ought to be imposed in the circumstances of this case. For present purposes, suffice for me to quote the following excerpts from that case:

> [47] … The police force is a public professional body and as in other professional bodies there exist duties of care in their discharge of their powers. In the context of the police force, it is their standard operating procedure (SOP) and that should be subject to scrutiny by the court of law. As to what that duty of care and standard of care are depend on the circumstances of each individual case and it is for the courts to determine what that duty and standard of care are as was done in the Federal Court case of *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2006] 2 MLRA 410.
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> [48] In *Foo Fio Na* case, the Federal Court quoted with approval Callaghan J in *Hajgato v. London Health Association* [1982] 36 OR (2d) 669, where in an action in negligence in respect of personal injuries sustained during post-operative case the learned judge stated as follows:
>
> > In my view however, a court has a right to strike down substandard approved practices when **common sense dictates such a result.** No profession is above the law and the courts on behalf of the public have a critical role to play in monitoring and precipitating changes where required in professional standards. (emphasis added)

[53] Now, based on the evidence laid before the learned Magistrate, strictly speaking, there is no error when she concluded that the requirement to blacklist Car WMN 3818 is merely a SOP and not an obligation under any written law, in particular the PA 1967.

[54] The question which the plaintiff invites this court to probe is whether, even if the cause of action was not pleaded with the required particularity, D1 and D5 nevertheless owe a duty of care to the plaintiff and that there was a breach of such duty. In my considered view, the answer to this query must be in the negative. The force of arguments in *Hill v. Chief Constable of West Yorkshire* [1989] 1 AC 53, a case referred to by the learned FC, as to the need to establish such proximity of relationship or any additional characteristics capable of establishing a duty of care, and on the grounds of public policy

against finding a liability in the circumstances of this case, is compelling. It has not escaped the attention of this court that *Hill*'s case (*supra*) was also cited by the Senior FC in *Hu Sepang*'s case where the High Court distinguished the facts in *Hill*'s case as one where the appellant was trying to dictate the manner in which the police should carry out their duties. However, the utility of *Hill*'s case to the current analysis is on the issues of proximity of the relationship between the plaintiff and D1 and D5, and reasonable foreseeability of harm being caused to the plaintiff.

[55] The facts in *Hill*'s case are outlined in the head note of the law report. The plaintiff's daughter in that case was attacked at night in a city street of the police area of which the defendant was chief constable and she died from her injuries. Her attacker, a man by the name of Sutcliffe who was convicted of her murder, was alleged to have committed a series of offences of murder and attempted murder against young women in the area in similar circumstances over a period of years before the deceased's murder. The plaintiff claimed, on behalf of her deceased daughter's estate, damages against the defendant for negligence, in that in the conduct of investigations into the crimes which had been committed, the police failed to apprehend Sutcliffe and prevent the murder of her daughter. On the defendant's application, the judge ordered the striking out of the writ and SoC as disclosing no cause of action.

[56] In delivering the judgment of the House of Lords, Lord Keith of Kinkel at p. 59 identified the question of law as whether "… the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence; to anyone who suffers such injury by reason of breach of that duty".

[57] His Lordship reminded that foreseeability of likely harm is not in itself a sufficient test of liability in negligence and that there has to be "some further ingredient" to establish the requisite proximity of relationship between plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present since the nature of the ingredient will vary from case to case. Reference was made to the speech by Lord Diplock in *Dorset Yacht Co Ltd v. Home Office* [1970] AC 1004 at p. 1058 as follows:

> The judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.

[58] Next, His Lordship discussed the features of the case in *Dorset Yacht* (*supra*) and the actual decision, which was on a preliminary point of law, that a special relationship existed on the one hand between the prison officers and the Borstal boys who were in their custody, and on the other hand between the prison officers and the owners of yachts moored near the encampment. The fact that the boys might seek to make use of a yacht in order to get away to the mainland and might damage it in the process was the very thing which the prison officers ought reasonably to have foreseen and accordingly liability was capable of being established on the facts of that case. Lord Diplock's exposition at pp. 1070 to 1071 (with my own added emphasis) was quoted:

> *The risk of sustaining damage from the tortious acts of criminals is shared by the public at large. It has never been recognized at common law as giving rise to any cause of action against anyone but the criminal himself.* … To give rise to a duty on the part of the custodian owed to a member of the public to take reasonable care to prevent a Borstal trainee from escaping from his custody before completion of the trainee's sentence *there should be some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage* in consequence of that escape *which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public.* … So long as Parliament is content to leave the general risk of damage from criminal acts to lie where it falls without any remedy except against the criminal himself the courts would be exceeding their limited function in developing the common law to meet changing conditions if they were to recognise a duty of care to prevent criminals escaping from penal custody owed to a wider category of members of the public than those whose property was exposed to an exceptional added risk by the adoption of a custodial system for young offenders which increased the likelihood of their escape unless due care was taken by those responsible for their custody. I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was *owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or appropriate and damage in the course of eluding immediate pursuit and recapture.* Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped. (emphasis added)

[59] Lord Keith of Kinkel, in reverting to the facts of the case on appeal before the House of Lords, then said:

> The *Dorset Yacht* case was concerned with the special characteristics or ingredients beyond reasonable foreseeability of likely harm which may result in civil liability for failure to control another man to prevent his doing harm to a third. The present case falls broadly into the same

> category. It is plain that vital characteristics which were present in the *Dorset Yacht* case and which led to the imposition of liability are here lacking. … The conclusion must be that *although there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Office in the Dorset Yacht case. Nor is there present any additional characteristic such as might make up the deficiency.* The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire Police.
>
> That is sufficient for the disposal of the appeal. But in my opinion *there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy.* … The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind.
>
> … Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that the went on to commit further crimes. … *A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime.* (emphasis added)

[60] Lord Templeman in a separate judgment identified the question for determination in the appeal as "… whether an action for damages is an appropriate vehicle for investigating the efficiency of a police force". His Lordship opined that:

> … The present action could only investigate whether an individual member of the police force conscientiously carrying out his duty was negligent when he was bemused by contradictory information or overlooked significant information or failed to draw inferences which later appeared to be obvious. That kind of investigation would not achieve the object which Mrs. Hill desires. *The efficiency of a police force can only be investigated by an inquiry instituted by the national or local authorities which are responsible to the electorate for that efficiency.*
>
> Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the

A policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. *The threat of litigation against a police force would not make policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.*

B This action is in my opinion misconceived and will do more harm than good. *A policeman is a servant of the public and is liable to be dismissed for incompetence …* (emphasis added)

[61] Turning to the facts of the case in the present appeal, the plaintiff did not adduce any evidence at the trial to establish a distinctive relationship C between him and D1 and D5 or any additional characteristic which exposed the plaintiff to a particular risk of damage in consequence of the failure by D5 to blacklist Car WMN 3818 which is different in its incidence from the general risk of damage from such similar omissions occasioned to other members of the public. In other words, the proximity of relationship between the plaintiff and D1 and D5 was just not proven, on a balance of D probabilities, at the trial.

[62] Moreover, the rationale in not favouring the expansion of a duty of care in the factual matrix of the instant case as elucidated by Lord Templeman in *Hill*'s case is persuasive. An action in negligence and for E damages is not, in my opinion, an appropriate vehicle for investigating the efficiency of PDRM and RTD. There are internal procedures/inquiries in place for investigations against incompetent police personnel whose acts or omissions are not wilful in nature such as the omission to blacklist Car WMN 3818 in the instant case. If an action of this nature lies against D1, D2, D5 and D6, the floodgates will be opened, and public departments and F their officers will constantly face the threat of litigation and much time, expenses and energy will be diverted in defending such claims rather than being channelled for the purpose in which the departments are established in the first place. This would be an unwelcomed distraction. The plaintiff's recourse, as correctly put by the learned Magistrate, is against D3 and D4 G for which judgment-in-default has been entered.

[63] In the upshot, whilst the analytical part of the judgment may be wanting, the learned Magistrate's conclusion that there is no negligence on the part of D1, D2, D5 and D6 is not plainly wrong. The grounds of appeal on the issue of the establishment of a duty of care at the trial in the court H below suffice to dispose of the plaintiff's appeal and there is no necessity for this court to deal with the other grounds of appeal.

I

Conclusion

[64] Based on the reasons as explicated above, the plaintiff's appeal was dismissed. On the issue of costs, the learned FC prayed for the sum of RM8,000. The plaintiff's counsel submitted that RM2,000 would suffice since the plaintiff had to appeal to the Court of Appeal earlier and no order was made as to costs. The FC retorted that this is exactly the reason why D1, D2, D5 and D6 were seeking costs of RM8,000. The court took the view that a sum of RM6,000 is appropriate and fair as costs to be paid by the plaintiff to D1, D2, D5 and D6, subject to allocatur.